BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BANDULA WICKRAMARATNE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,013
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF INSURANCE FUND	)	
Insurance Carrier	)	

ORDER

Claimant requested review of the July 10, 2012, Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on November 6, 2012.

APPEARANCES

Kevin J. Kruse, of Overland Park, Kansas, appeared for the claimant. Bryce D. Benedict, of Topeka, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument to the Board the attorney for claimant stipulated that if the $1,200 was included in the average weekly wage, that amount should be divided by 52 weeks rather than 26.

ISSUES

The ALJ found claimant to have an 11 percent impairment to the left leg at the knee based on the opinion of Dr. Rasmussen.

Claimant appealed, arguing that the rating of Dr. Prostic is more accurate and appropriate under the AMA *Guides* and therefore, the Board should modify the Award and

adopt Dr. Prostic's 45 percent functional impairment to the left lower extremity. Claimant also argues that his average weekly wage should be modified to include the $1,200 he received as a longevity bonus.

Respondent argues that the ALJ's Award should be affirmed as the best evidence is that the left knee has been symptomatic since 2005 and was not fully functional at the time of the accident despite claimant's testimony to the contrary. Respondent contends claimant continues to qualify for the bonus, therefore under K.S.A. 44-511(a)(2) the bonus cannot be included in the average weekly wage.

Issues

1. What is the nature and extent of claimant's disability?

2. Should the $1,200 longevity bonus be included in claimant's average weekly wage?

FINDINGS OF FACT

Claimant has worked for KU Medical Center through the State of Kansas for 26 years as a refrigeration and air conditioner technician. Claimant's job is to repair the refrigeration and cooling systems throughout the entire campus.

Claimant testified that on September 21, 2010, he suffered an injury to his left knee while working on restoring airflow to the cooling system. Claimant testified that he was up on a ladder trying to change a belt, when, as he was on his way down, he missed the last rung and stepped down hard with his left foot, hitting his toe and then his heel. He lost his balance because of tools in his right hand and after he dropped those he grabbed hard on the ladder to catch himself. Claimant felt immediate pain in the middle and right side of his left knee.[1] At first he didn't have the strength to stand.

Claimant reported the accident to his manager, Steve DeLorenzi, and was authorized to see a doctor. When claimant met with Dr. Greg Bono at the KU Medical Center, Dr. Bono ordered an MRI, provided restrictions and referred claimant to board certified orthopedic surgeon, Mark R. Rasmussen, M.D. Dr. Rasmussen first met with claimant on October 27, 2010, initially providing claimant with conservative treatment. He then ordered physical therapy and steroid injections for claimant. Claimant testified that none of this treatment provided any lasting benefit. Claimant was presented with the option of total knee replacement or arthroscopic surgery. Claimant chose arthroscopic surgery to repair a medial meniscus tear and a lateral meniscus tear. The surgery was performed by Dr. Rasmussen on June 16, 2011. Claimant also underwent a

[1] R.H. Trans. at 12-14.

chondromalacia procedure on the medial femoral condyle and medial tibial plateau of the patella.[2]

Claimant experienced minimal improvement with surgery. He was released from Dr. Rasmussen's care on October 12, 2011. He was able to return to work and continues to do the exercises recommended by Dr. Rasmussen at least three times a week. Claimant wears special shoes recommended by Dr. Rasmussen.

Claimant admits to prior accidents while working for respondent. The first was on October 2, 1989, when he slipped and injured his left kneecap. He received no medical treatment or workers compensation disability compensation for that accident. The second accident occurred on October 10, 2004, when claimant strained his left knee while carrying a heavy compressor. The third accident was on August 11, 2004, when claimant slipped and fell injuring his right knee. The fourth accident was November 5, 2004, when he re-injured his right knee after pushing an ice machine up a ramp. Claimant received medical treatment for those injuries and ultimately had arthroscopic surgery on his right knee with Dr. Lowry Jones on November 29, 2004. Claimant also developed complaints in his lower back and left knee from overuse of the left knee while favoring the right knee.[3] Claimant testified that physical activity increases his pain. He can't fully extend his left knee and must sleep with a pillow under the knee to keep the pain from waking him up in the middle of the night.

Dr. Jones released claimant in 2005 with no restrictions. Claimant did not receive any medical treatment for his left knee from 2005 to September 21, 2010, when he had the current accident.

Claimant testified that respondent has attempted to accommodate him for the last four to six weeks. This seems to be helping his pain. But, he still has to do some walking which causes him pain. Claimant also has problems driving because he drives a vehicle with a manual transmission and he feels pain in his left knee while using the clutch. Claimant has his wife drive him at least four times a week.

Claimant has clicking and popping in his left knee, three to four times a week. On rainy, muggy days claimant has pain and stiffness in both knees. He continues to have weakness in his right knee.

At the request of his attorney, claimant met with board certified orthopedic surgeon Edward J. Prostic, M.D., on November 4, 2011, for an evaluation. Dr. Prostic noted that he had previously seen claimant on March 18, 2005, for complaints to the right knee, post

---

[2] *Id.* at 17-18.

[3] *Id.* at 21-22.

surgery with Dr. Jones. Claimant, at that time, also had complaints in the left knee and the low back. Dr. Prostic reported that when claimant injured his left knee he had a re-emergence of low back pain and right heel pain that has gone untreated. He recommended additional treatment, medication and exercise. Dr. Prostic opined claimant was likely symptomatic prior to the injury. He noted left knee chondromalacia had partially developed in 2005. This indicates loss of the articular cartilage.

Claimant's complaints at the November 4, 2011, visit included frequent pain in the left knee anteriorly and laterally, worse with more than short term standing or walking; difficulty on stairs and ramps; difficulty squatting and kneeling; inability to run, jump, or dance; swelling, clicking, popping, giving way; and sensitivity to inclement weather. Dr. Prostic noted that claimant denied any prior difficulty with his left knee.

Dr. Prostic opined claimant had severe osteoarthritis that would require total knee replacement arthroplasty in the near future. He assigned claimant a 50 percent permanent partial impairment to the left lower extremity. He had assigned claimant a 5 percent permanent partial impairment to the left knee in 2005. He also noted claimant had been assigned a 5 percent impairment by Dr. Pratt for the previous injury in 2005. In his opinion, this would leave claimant currently with a 45 percent permanent partial impairment to the left lower extremity.[4] Dr. Prostic related this remaining impairment to claimant's September 21, 2010, work accident.

Dr. Prostic had no explanation as to why claimant would not have a preexisting 50 percent permanent partial impairment to the left lower extremity if his prior x-rays showed his knee was bone on bone and his current x-rays showed the same condition. He was provided the x-ray reports from Dr. Rasmussen's exam of November 5, 2010. He agreed that claimant had severe medial compartment arthrosis, i.e. bone-on-bone, at that time. He agreed that claimant did not develop bone-on-bone in the 6 weeks leading up to the more recent injury. He also agreed claimant did not develop the bone-on-bone condition from the misstep from the ladder. Dr. Prostic acknowledged that the AMA *Guides*[5] do not require the bone-on-bone condition be symptomatic in order to qualify for a 50 percent functional impairment rating.

Dr. Prostic opined that the reason claimant was able to postpone total knee replacement was because his problems were mechanical (clicking, popping, locking, giving way) and most times those problems can be improved with arthroscopic debridement.[6] He also opined that claimant is at risk for additional low back complaints in the future if his left

---

[4] Prostic Depo. at 19.

[5] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are to the 4th edition unless otherwise noted.

[6] Prostic Depo. at 9.

knee issues continue to worsen. Dr. Prostic acknowledged that claimant was a candidate for total knee replacement due to his significant loss of articular cartilage and mal-alignment before the injury. In his opinion, claimant will only continue to get worse. But, Dr. Prostic went on to testify that claimant's work-related injury caused the tearing of the menisci in his knee which accelerated claimant's arthritic condition.

When claimant met with Dr. Rasmussen on October 27, 2010, he found claimant to have severe medial compartment arthrosis of the left knee and a medial meniscal tear of the left knee. Claimant's arthritis was severe. Dr. Rasmussen made it clear that the arthritis was not due to the work incident. Additionally, he stated that treating claimant's tear was going to be unpredictable because of the arthritis. In his opinion, the arthritis had been there for more than four weeks. Dr. Rasmussen recommended medical treatment, physical therapy and an injection. If those didn't work he recommended an arthroscopy.

Dr. Rasmussen assigned claimant restrictions of no kneeling, squatting, climbing or crawling, no pushing or pulling more than 45 pounds, no lifting more than 20 pounds and no lifting more than 20 pounds at waist level.

Claimant was next seen on November 17, 2010. At that time he had good stability, but with mild pain along his medial joint line and some mild patellofemoral discomfort. Dr. Rasmussen opined that claimant had severe medial compartment degenerative joint disease of his left knee and a degenerative medial meniscal tear. Arthroscopy was recommended for the knee and an injection. Claimant was not working at the time of this visit, but was allowed to work full duty.

Claimant was seen again on December 10, 2010. Claimant continued to have pain in his left knee. He received another injection and was instructed to avoid climbing or kneeling. Claimant was diagnosed with a medial meniscal tear on top of severe medial compartment arthritis.

Claimant's left knee complaints continued into January 2011 at which time a total knee replacement was discussed. Claimant received another injection in February 2011. In April 2011 alternative treatment options were again discussed.

In his report dated May 24, 2011, Dr. Rasmussen opined that claimant's current left knee condition was related to his work accident because it could have torn the meniscus and aggravated claimant's arthrosis.

Claimant underwent a left knee arthroscopy with partial medial meniscectomy, partial lateral meniscectomy, chondroplasty of the medial femoral condyle and medial tibial plateau for grade III/IV chondromalacia, and chondroplasty of the patella for grade III chondromalacia of the patella on June 16, 2011.

Claimant was not working at that time, but was released to light duty on June 27, 2011, with restrictions of alternating sitting and standing as needed for pain control and no kneeling, squatting, climbing, crawling, running, jumping or pivoting. Four weeks of physical therapy were also ordered.

Claimant had a promising result from surgery, but continued off work in July 2011. His lifting was restricted to no more than 15 pounds max to chest, waist or overhead. Additional physical therapy was ordered.

By August 10, 2011, claimant was back to work on light duty. He was restricted to lifting, pushing or pulling no more than 25 pounds. Treatment recommendations included work conditioning/hardening half days, 5 days a week for two weeks. By August 29, 2011, claimant was released to full duty and instructed to continue with his home exercises.

Claimant was last seen by Dr. Rasmussen on October 12, 2011. Claimant continued to have limited range of motion in the flexion of his left knee. Dr. Rasmussen noted claimant had mild swelling in his knee and assumed it to be from arthritis.[7] Claimant was found to be at maximum medical improvement.

Dr. Rasmussen, in a December 12, 2011, letter diagnosed a left medial meniscus tear, lateral meniscus tear, degenerative joint disease and medial compartment and patellofemoral chondromalacia. He again released claimant to full duty with no restrictions and assigned an 11 percent impairment to claimant's left lower extremity. Claimant was encouraged to continue with a home exercise program.

On April 2, 2010, claimant received longevity pay in the amount of $1,200.00. The check issued by respondent was dated March 20, 2010, a Saturday.[8] Claimant has been receiving this longevity pay for 15 years with the amount increasing slightly during that time. Claimant considers the money to be part of his wages. The ALJ determined that the $1,200 payment represented gross remuneration rather than a bonus. Therefore, the amount was included in claimant's wage rather than as additional compensation. The ALJ determined a March 20, 2010, payment would not fall within the 26 week period contemplated by K.S.A. 44-511(b)(5).

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[9]

---

[7] Rasmussen Depo. at 25.

[8] R.H. Trans., Resp. Ex. A.

[9] K.S.A. 44-501 and K.S.A. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[10]

K.S.A. 44-510e defines functional impairment as,

> . . . the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[11]

This record contains two ratings to claimant's left knee. Dr. Rasmussen found claimant to have suffered an 11 percent impairment to the lower extremity pursuant to the AMA *Guides*, 4th ed. His rating stemmed from the damage to claimant's meniscus and the resulting surgery to repair same. He determined that claimant's bone-on-bone condition to the left knee preexisted the accident on September 21, 2010. Dr. Prostic rated claimant at 50 percent to the left lower extremity, including the degenerative knee condition in his rating. However, Dr. Prostic agreed claimant's bone-on-bone knee condition and the 50 percent lower extremity rating preexisted the date of accident. He also agreed that claimant did not develop that degenerative condition from the misstep off the ladder at work.

The ALJ determined that claimant's left lower extremity rating should be controlled by the medical opinion of Dr. Rasmussen and limited to an 11 percent impairment to the lower extremity. The Board agrees. Claimant suffered from a pre-existing degenerative condition which Dr. Prostic said was in some way aggravated by the fall on September 21, 2010. However, Dr. Prostic agreed the fall did not cause the "bone-on-bone" condition and agreed claimant had a 50 percent impairment to the extremity for the extensive arthritis deterioration before the accident. Dr. Prostic acknowledged the AMA *Guides* do not require symptoms in order to rate the "bone-on-bone" condition. The Board agrees with the ALJ's determination that claimant suffered the 11 percent impairment from this accident. This record does not support a finding that claimant's chondromalacia was permanently aggravated by this accident.

The ALJ found the $1,200 payment received by claimant as a longevity payment represented a portion of claimant's regular compensation and thus was to be included in the average weekly wage. The Board agrees. The Board was asked to address this issue

---

[10] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[11] K.S.A. 44-510e(a).

in *Scaife.*[12] In *Scaife,* the claimant was paid money identified in the record as "Longevity Additional Compensation," just as in the present case. The claimant in *Scaife* qualified for the added payment due to his period of employment with the respondent and qualified to receive the yearly payment in the future, based upon his tenure with the respondent. The claimant in *Scaife* considered the payment as part of his wage, just as in this case. The Board found the payment in *Scaife* to be contractual, based on years of service and not on any profit or typical bonus scenario. The Board finds its prior holding in *Scaife* is determinative of this dispute.

The ALJ found the payment to claimant was made outside the 26 week period identified in K.S.A. 44-511. The Board disagrees. Claimant testified that he actually received the longevity payment on April 2, 2010, which is within the 26 week period. Respondent agreed at the oral argument before the Board that claimant would not have received the longevity payment on March 20, 2010. Instead the payment would have arrived several days later. Claimant's testimony that he actually received the payment on April 2, 2010, is uncontradicted in this record. Therefore, the longevity pay was paid to claimant within the 26 weeks preceding the accident and shall be included as a portion of claimant's average weekly wage. However, as in *Scaife*, the payment was clearly contemplated to be paid by the year. Therefore, the $1,200 will be divided by 52 weeks, rather than the 26 week period normally used for an average weekly wage calculation. This calculates to a weekly addition to the average weekly wage of $23.08. Claimant's average weekly wage is found to be $790.63 which calculates to a weekly compensation payment of $527.11. The Award of the ALJ will be adjusted accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed with regard to the finding that claimant suffered an 11 percent impairment to the left lower extremity as the result of the September 21, 2010 accident, but reversed with regard to the exclusion of the $1,200 from the calculation of the average weekly wage. In all other regards the Award of the ALJ is affirmed in so long as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated July 10, 2012, is affirmed with regard to the finding that claimant suffered an 11 percent impairment to the left lower extremity as the result of the accident on September 21, 2010, but reversed with regard to the calculation of claimant's average weekly wage.

---

[12] *Scaife v. State of Kansas*, No. 1,042,765, 2010 WL 2242756 (Kan. WCAB May 25, 2010).

Claimant is entitled to 4.57 weeks of temporary total disability compensation at the rate of $527.11 per week totaling $2,408.89, followed by 21.50 weeks permanent partial disability compensation at the rate of $527.11 totaling $11,332.87, for a total award of $13,741.76, all of which is due and owing and ordered paid in a lump sum, minus amounts previously paid. The Award is based upon an 11 percent impairment to the left lower extremity, from the accident on September 21, 2010.

In all other regards, the Award of the ALJ is affirmed in so far as it does not contradict the findings and conclusions contained herein.

IT IS SO ORDERED.

Dated this _____ day of December, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Kevin J. Kruse, Attorney for Claimant
kkruse@bkwwflaw.com

Bryce D. Benedict, Attorney for Respondent and its Insurance Carrier
khenderson@kdheks.gov
bbenedict@kdheks.gov

Kenneth J. Hursh, Administrative Law Judge